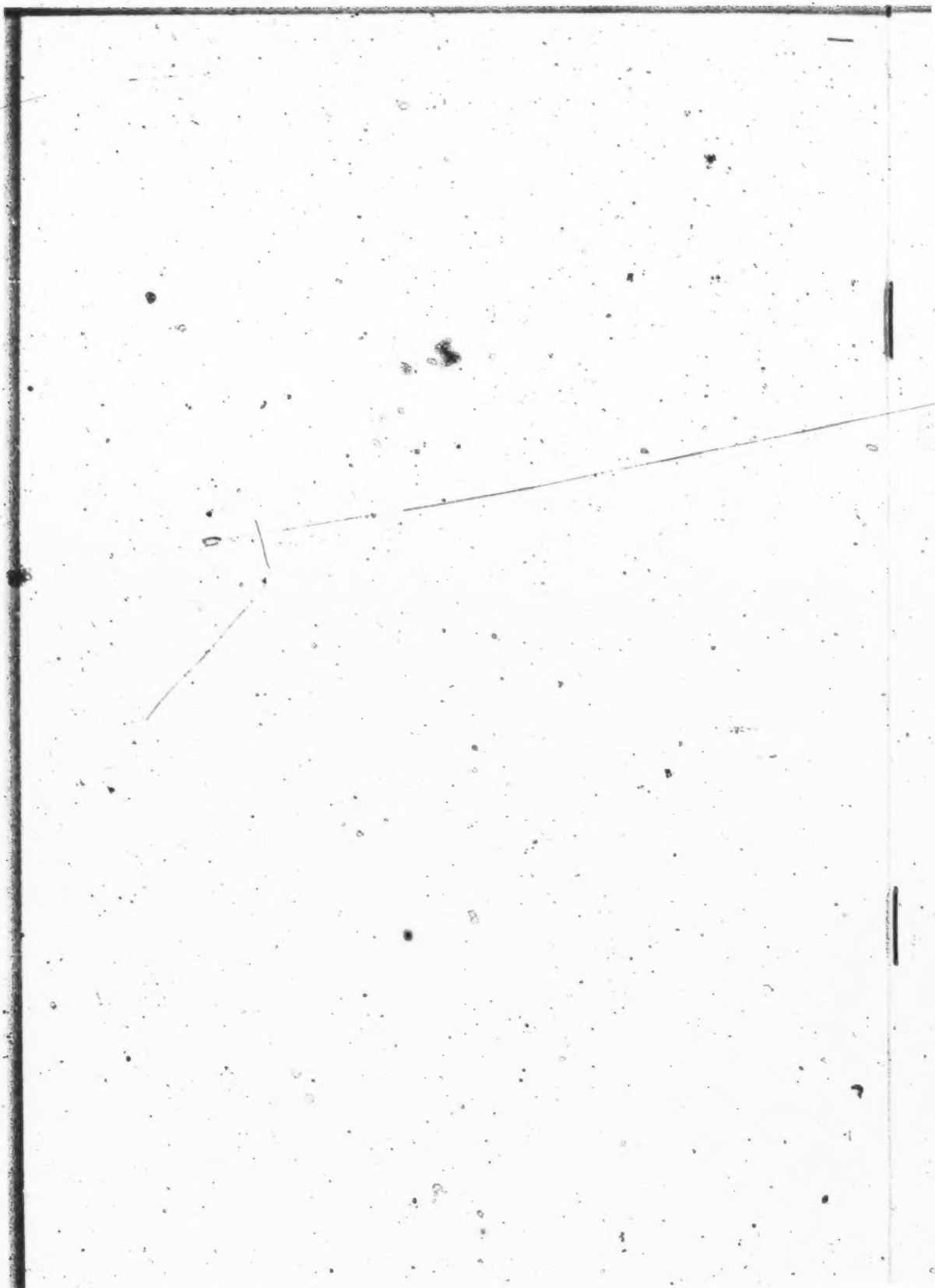

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1159

SOUTHERN PACIFIC COMPANY, *et al.*,
Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

APR 23 1968
JOSEPH F. SPANIOL, JR., CLERK

BRIEF OF APPELLANTS SOUTHERN PACIFIC COMPANY AND UNION PACIFIC RAILROAD COMPANY IN OPPOSITION TO MOTIONS TO AFFIRM

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Introduction

This brief is submitted in opposition to (1) the joint motion to affirm of the United States and the Interstate Commerce Commission ("US Motion"), and (2) the joint motion to affirm of DRG and WP ("DRG Motion").

Both motions have been made pursuant to Rule 16(1)(c) of this Court which requires the moving party to establish "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." Neither motion, however, discusses or even mentions, the substantiality of the questions

fected before Section 3(4) is violated. But the court held that solicitation as well as routing was embraced by Section 3(4) and that therefore the statute had here been violated. The Commission has never previously condemned preferential solicitation either pursuant to the National Transportation Policy or otherwise; nor has any court (or the Commission), in the 48 years during which Section 3(4) has been law, ever previously interpreted the statute as condemning preferential solicitation. The failure of appellees to analyze carefully these issues is one of the more shocking features of the motions to affirm.

(5) The issue of the scope of the immunity provision of Section 5(11) of the Interstate Commerce Act is substantial since that statute may be involved in merger proceedings currently before the Commission. The substantiality of the issue is underscored by the fact that the court below interpreted Section 5(11) in a manner never adopted by the Commission.

The Correctness of the Decision of the Court Below

Appellants' Jurisdictional Statement demonstrates that the court below erred in five fundamental respects. (pp. 12-35) Certain of these errors are discussed in the motions to affirm. The discussion, however, is fragmentary, and the majority of appellants' arguments are ignored. To give but one example, appellants argued (pp. 20-22) that the Commission in 1966, in reversing its 1962 report, erred in failing to explain why the four bases relied on in the earlier report no longer were determinative. The motions to affirm completely ignore appellants' argument and fail to discuss a single one of the four bases of the 1962 report.

Furthermore, the motions to affirm, despite their brevity, contain serious misstatements. Some of these misstate-

ments will be referred to simply for the purpose of indicating that the motions should be read with extreme caution:

(1) Both motions state that in 1962 the Commission did no more than hold that condition (e) was not unjust and unreasonable "as a matter of law." (fn. 2, pp. 4-5 of US Motion; p. 5 of DRG Motion) This is incorrect. Nowhere in the 1962 report is there the slightest intimation that the Commission's determination was confined to issues of law. As appellants' Jurisdictional Statement explains (pp. 20-22), the Commission in 1962 discussed and resolved a variety of factual issues. Additionally, the Commission's order in 1962 recited that the Commission had filed its report "containing its findings of fact and conclusions thereon."*

(2) Both motions state that the 1924 agreement was "never approved by the Commission." (US Motion pp. 4, 7; DRG Motion p. 12) This is literally *true but the* statement is misleading. The Interstate Commerce Act contains no provision either requiring or authorizing the Commission to approve such an agreement and the Commission did not find in this proceeding that it had the power to approve such an agreement. Nor has it ever contended that it had such power.

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* The motions to affirm seek to create the impression that the Colorado District Court remanded the 1962 report because of the failure of the Commission to consider evidence as to the justness and reasonableness of condition (e). The opinion of the Colorado Court, however, makes it clear that the sole purpose of the remand was to require the Commission to consider other issues in addition to condition (e). *Denver & R.G.W.R.R.* v. *ICC*, 229 F. Supp. 249, 254 (1964). Moreover, the Colorado Court, at p. 252, detailed the factual determinations which had been made by the Commission in support of its 1962 report.

(3) The US Motion (p. 4) refers to condition (i) of the 1923 *Control* case which provided that the Commission should have the power to make "supplementary" orders. The US Motion then states that DRG in 1923 indicated to the Commission that it was agreeable to SP control of CP "as conditioned." This is a dangerously garbled account of the evolution of the conditions attached to the Commission's order in the *Control* case. At the suggestion of SP and UP the Commission in 1923 had submitted, for the consideration of the parties to the *Control* case, five conditions which ultimately became conditions (a)-(e). On the basis of these five conditions DRG indicated that it would not object to Commission approval of SP's application. Condition (i), as well as conditions (f), (g) and (h), were subsequently added by the Commission to its order and obviously could have played no part in DRG's assent.

(4) The US Motion (p. 9) states:

> "The [Pacific Railroad] Acts did not provide for, nor contemplate, the eventual existence of parallel coast-to coast lines which would enter into direct competition with the Union Pacific-Central Pacific complex."

The Commission stated exactly the opposite in the 1966 report:

> "[T]he Pacific Railroad Acts clearly contemplated the addition of other railroads to the Overland route . . . ." (328 I.C.C. at 355)

Conclusion

The motions to affirm fail to establish that any of the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Accord-

ingly, the motions should be denied. Probable jurisdiction should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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